

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE**

Howard D. Kelly

v.

Civil No. 13-cv-107-LM
Opinion No. 2014 DNH 129

Warren Dowaliby, et al.¹

O R D E R

Before the court is Dawn Dow, Rebecca Eischen, and Tracy Warren's (first) motion for summary judgment ([doc. no. 24](#)).² Plaintiff Howard Kelly has objected ([doc. no. 25](#)), and defendants have replied ([doc. no. 27](#)).

Also before the court is the same defendants' motion for partial reconsideration of this court's May 7, 2014, order ([doc. no. 40](#)), which allowed Kelly to add a claim under 28 U.S.C. § 1983 against former Strafford County House of Corrections

¹Defendants originally served with the complaint are Strafford County Department of Corrections ("SCDC") Nurse Tracy Warren, and SCDC Medical Department staff members Rebecca Eischen and Dawn Dow. On May 7, 2014, this court granted, in part, a motion to amend the complaint to join former SCDC Superintendent Warren Dowaliby and ten unnamed John and Jane Doe SCDC Medical Department staff members as defendants to this action. For reasons stated in this order, the court vacates that aspect of the May 7 order, and denies the motion to add claims against Dowaliby and the John and Jane Doe defendants.

²Defendants Dow, Eischen, and Warren filed their second motion for summary judgment ([doc. no. 31](#)) in March 2014, and also moved ([doc. no. 43](#)) for an extension of the September 1, 2014, deadline for their expert disclosures. The time allowed for plaintiff to respond to those motions has not yet elapsed.

("SCHC") Superintendent Warren Dowaliby, and to join ten John and Jane Doe SCHC Medical Department employees as defendants to the claim asserted against Dow, Eischen, and Warren. Kelly has not responded to the reconsideration motion.

Background

Kelly has alleged that while he was a federal pretrial detainee at the SCHC from July 17, 2008, to March 12, 2010, he suffered from a seizure disorder that defendants did not treat. In particular, defendants did not provide him with the anti-seizure medication originally prescribed for him at a federal Bureau of Prisons facility in 2003 after he suffered a traumatic brain injury.

Kelly has alleged that although he complained many times to SCHC medical department staff about his need for anti-seizure medication and the frequency of his seizures at the SCHC, he received no medication or other treatment. Kelly claims that he now suffers from migraine headaches, memory loss, loss of concentration, and vision loss. Kelly further asserts that the failure to give him daily doses of anti-seizure medication while he was at the SCHC caused or exacerbated these problems.

Kelly's original complaint named Dow, Eischen, Warren, and Dowaliby as defendants. This court reviewed the original complaint in June 2013, pursuant to [28 U.S.C. § 1915A](#), see

Report and Recommendation ([doc. no. 9](#)), and concluded that the allegations relating to Dowaliby in the original complaint did not state a plausible claim for relief. See Order ([doc. no. 19](#)). The court further found that Kelly had pleaded plausible Fourteenth Amendment inadequate medical care claims against Dow, Eischen, and Warren, and directed service upon those defendants as follows:

Kelly was denied his Fourteenth Amendment due process right to adequate medical care during pretrial detention, because defendants (a) Dow, (b) Eischen, and (c) Warren, with deliberate indifference, failed to treat Kelly's seizure disorder, a serious medical need.

See Order ([doc. no. 10](#)). The court subsequently dropped Dowaliby from the case. See Order ([doc. no. 19](#)).

Kelly, in December 2013, moved to amend the complaint to reinstate a claim against Dowaliby, and to add unnamed John and Jane Doe SCHC Medical Department employees as defendants to the Fourteenth Amendment claim served upon Dow, Eischen, and Warren six months before. See Mot. to Amend Compl. ([doc. no. 29](#)). This court, on May 7, 2014, granted that motion in pertinent part, allowing the amended complaint to be filed, and joining Dowaliby and the John and Jane Does as defendants. See [Doc. No. 38](#) ("May 7 order"). In that ruling, the court specifically took under advisement whether the claims might be barred by the statute of limitations. See May 7 order, at 5-6, nn.2-3.

Discussion

I. Summary Judgment

A. Standard

Under [Federal Rule of Civil Procedure 56](#), a “court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” . . . [A] dispute [is] genuine if “a reasonable jury, drawing favorable inferences, could resolve it in favor of the nonmoving party. . . . Conclusory allegations, improbable inferences, and unsupported speculation, are insufficient to establish a genuine dispute of fact.”

[Travers v. Flight Servs. & Sys., Inc.](#), 737 F.3d 144, 146 (1st Cir. 2013) (citations omitted). Defendants have moved for summary judgment on their affirmative defenses to the Fourteenth Amendment claims against Dow, Eischen, and Warren, asserting that Kelly’s claims are time-barred, and that Kelly failed to exhaust his administrative remedies before filing suit, as required by the Prison Litigation Reform Act (“PLRA”), [42 U.S.C. § 1997e\(a\)](#). Finding the statute of limitations issue to be dispositive, this court expresses no opinion as to whether Kelly exhausted his administrative remedies.

B. Statute of Limitations

There is a three-year statute of limitations applicable to Kelly’s § 1983 claims. See [Gorelik v. Costin](#), 605 F.3d 118, 121 (1st Cir. 2010). “Section 1983 claims generally accrue when the

plaintiff knows, or has reason to know of the injury on which the action is based, and a plaintiff is deemed to know or have reason to know at the time of the act itself and not at the point that the harmful consequences are felt.” Id. at 122 (internal quotation marks omitted).

Kelly asserts that the statute of limitations began to run on March 10, 2010, the day he was transferred from SCHC. Kelly has averred that he submitted his complaint for filing on or about February 21, 2013, less than three years after his last day at SCHC, and he relies on the continuing violation doctrine to allow events dating back to his first day at the SCHC, July 8, 2008, to be actionable.

The continuing violation doctrine allows the accrual date in certain § 1983 actions “to be delayed until a series of wrongful acts blossoms into an injury on which suit can be brought.” Perez-Sanchez v. Pub. Bldg. Auth., 531 F.3d 104, 107 (1st Cir. 2008).

[T]he continuing violation doctrine can apply when a prisoner challenges a series of acts that together comprise an Eighth Amendment claim of deliberate indifference to serious medical needs. . . . To assert a continuing violation for statute of limitations purposes, the plaintiff must “allege both the existence of an ongoing policy of [deliberate indifference to his or her serious medical needs] and some non-time-barred acts taken in the furtherance of that policy.” This test screens out Eighth Amendment claims that challenge discrete acts of unconstitutional conduct or that fail to allege acts

within the relevant statutory period that are traceable to a policy of deliberate indifference.

Shomo v. City of N.Y., 579 F.3d 176, 182 (2d Cir. 2009)

(citations omitted).

Assuming that the continuing violation doctrine applies to Kelly's claims, the court finds no allegations in this case, and no evidence in the record, suggesting that any defendant engaged in any affirmative act less than three years before Kelly filed this action, that could reasonably be deemed evidence of deliberate indifference to Kelly's medical needs. The last such affirmative act described in the complaint and in Kelly's declaration was Kelly's meeting with defendant Warren on December 15, 2009, in which they discussed his seizure disorder, and, Kelly avers, Warren said that a neurology appointment would be scheduled. Three months later, when Kelly was transferred to another federal facility, Kelly had not seen a neurologist.

Also in March 2010, the SCHC received a letter, dated March 15, 2010, sent by Attorney Robert Fisher on Kelly's behalf, stating that Kelly needed treatment for a seizure disorder. Kelly was a federal pretrial detainee for the duration of his confinement at the SCHC, and was discharged from the SCHC into federal Bureau of Prisons custody on March 10, 2010. There is no evidence suggesting either that Attorney Fisher's March 15 letter arrived prior to Kelly's March 10 transfer, or that any

SCHC personnel were responsible for the timing of the transfer and scheduled it in deliberate indifference to Kelly's serious medical needs. There is thus no basis upon which this court could conclude that defendants took any affirmative act in furtherance of a policy of deliberate indifference within three years of the date Kelly filed this action. As Kelly filed this action more than three years after December 2009, all of Kelly's claims are time-barred. The court therefore grants the motion for summary judgment based on the statute of limitations defense.

II. Reconsideration of the May 7 Order

This court has discretion to reconsider an interlocutory order at any time. See generally [Latin Am. Music Co. v. Media Power Grp.](#), 705 F.3d 34, 40 (1st Cir. 2013). Dow, Eischen, and Warren seek reconsideration of the May 7 order directing service upon Dowaliby and the Doe defendants, based on their contention that all claims against Dowaliby and the Does are time-barred. For reasons set forth above with respect to defendants' motion for summary judgment, this court concludes that the claims asserted against Dowaliby and the Does are time-barred.

Moreover, with respect to the claims asserted against the Doe defendants, plaintiff sought to add those new defendants (without naming them) more than three years after he was transferred out of the SCHC. Dow, Eischen, and Warren have

shown that any claim asserted against those defendants would fall outside of the statute of limitations. Kelly, who bears the burden of showing that the Rule 15(c) relation back doctrine applies, waited more than 120 days after this court ordered service of the original complaint to move to add the Doe defendants. See Fed. R. Civ. P. 15(c)(1)(C); see also Smith v. Chrysler Corp., 45 F. App'x 326, 2002 WL 1899615, at *1 (5th Cir. 2002) (unpublished decision) ("Even assuming for the sake of argument that [plaintiff's] inability to identify [a new party] as a defendant could somehow count as a "mistake concerning the identity of the proper party" within the meaning of Rule 15(c)(3)(B), [plaintiff] would still have to prove that [new party] had timely notice of her suit."). Cf. Coons v. Indus. Knife Co., 620 F.3d 38, 44 (1st Cir. 2010) (plaintiff had burden of showing that Massachusetts relation back doctrine applied after defendant showed that amended complaint asserted claim outside of statute of limitations). Kelly has not shown that any of those as-yet unnamed John and Jane Doe defendants received notice of the action during that 120-day time period after this court directed service of the original complaint, or that any of the Doe defendants knew or should have known that this action would have been brought against them, but for a mistake as to the identity of the proper defendant. Accordingly, Kelly's claims against the John and Jane Doe

defendants would be time-barred, even if this court had found that the original complaint asserted a timely claim against Dow, Eischen, and Warren.

Conclusion

For the foregoing reasons, and for reasons stated in the May 7 order (to the extent that order is not vacated by this order):

1. Dow, Eischen, and Warren's (first) motion for summary judgment ([doc. no. 24](#)) is granted;

2. Dow, Eischen, and Warren's motion for partial reconsideration ([doc. no. 40](#)) of this court's May 7, 2014, order is granted;

3. The portions of the May 7 order ([doc. no. 38](#)), granting Kelly's motion to file the proposed amended complaint, and to add claims against Dowaliby and the ten John and Jane Does, are hereby vacated. The remaining parts of the May 7 order are not vacated.

4. The motion to amend the complaint ([doc. no. 29](#)) is denied in its entirety, insofar as this court finds that the claims allowed to proceed by the May 7 order are time-barred.

5. Dowaliby and the unnamed John and Jane Doe defendants shall not be served, and the original complaint ([doc. no. 1](#)) shall be deemed the operative complaint in this action.

6. The clerk shall redocket the Amended Complaint ([doc. no. 39](#)) as the "Proposed Amended Complaint" and shall cross-reference this order in that docket entry.

7. The pending (second) motion for summary judgment ([doc. no. 31](#)) and motion for an extension of defendants' expert disclosure deadline ([doc. no. 43](#)) are denied, without prejudice, as mooted by this order.

8. The clerk is directed to enter judgment and close the case.

SO ORDERED.

A handwritten signature in black ink, appearing to be 'Landya McCafferty', written over a horizontal line.

Landya McCafferty
United States District Judge

June 10, 2014

cc: Howard D. Kelly, pro se
Corey M. Belobrow, Esq.

LBM:nmd